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UNITED STATES BANKRUPTCY COURT

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SOUTHERN DISTRICT OF NEW YORK

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Case No. 12-12020-mg

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In the Matter of:

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RESIDENTIAL CAPITAL, LLC, et al.,

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Debtors.

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United States Bankruptcy Court

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One Bowling Green

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New York, New York

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August 14, 2013

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4:03 PM

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B E F O R E:

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HON. MARTIN GLENN

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U.S. BANKRUPTCY JUDGE

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2 Final Pre-Trial Hearing

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RESIDENTIAL CAPITAL, LLC, ET AL.

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1 P R O C E E D I N G S

2 THE COURT: All right. Please be seated.

3 We're here in Residential Capital, number 12-12020.
4 This hearing was scheduled in a supplemental scheduling order
5 number 2 that was entered yesterday. I have some things I
6 specifically want to cover. We'll go in the order in which I
7 have them rather than the agenda.

8 First with respect to the motions in limine. It's
9 important that you all be aware of my rulings so that you can
10 be fully prepared for trial on Friday, so I'm going to render
11 oral decisions on each of the motions in limine. With respect
12 to one of them, there will -- because it's a little more
13 complicated, there will be an order entered shortly after the
14 hearing.

15 So I have five motions in limine from the investor
16 parties, two motions in limine from Freddie Mac, one motion in
17 limine from the junior secured noteholders, one motion in
18 limine from FGIC.

19 MR. SIDMAN: Your Honor, if I -- I don't want to
20 interrupt you, but you asked us to meet and confer with respect
21 to the motions in limine. We have reached an agreement as to
22 one tiny issue, but however you --

23 THE COURT: Well, I asked you and meet and confer with
24 respect to the deposition designations and counter-
25 designations.

RESIDENTIAL CAPITAL, LLC, ET AL.

9

1 MR. SIDMAN: Okay. Well, we did speak --

2 THE COURT: Go ahead.

3 MR. SIDMAN: -- right before the conference --

4 THE COURT: Identify yourself for the record, Mr.
5 Sidman.

6 MR. SIDMAN: Sure. Your Honor, this is Howard Sidman
7 from Jones Day for FGIC. Right before the hearing, Your Honor,
8 we reached an agreement with counsel for McKool Smith with
9 respect to one issue. We will withdraw our motion in limine
10 with respect to Scott Gibson.

11 THE COURT: Okay.

12 MR. SIDMAN: And in turn, McKool Smith will agree to
13 not call -- I forget the person's name, but the representative
14 from Rothschild.

15 MR. CARNEY: Rothschild. Mr. Messer. That's correct,
16 Your Honor.

17 THE COURT: All right.

18 MR. SIDMAN: Thank you, Your Honor.

19 THE COURT: Thank you. All right.

20 Let me deal first with the motion in limine to
21 preclude the testimony of Jeffrey Lipps. This is the one that
22 is slightly more complicated. The motion in limine is granted
23 in part and denied in part. And they're for several reasons.

24 First, to the extent that Mr. Lipps has been proffered
25 as an expert witness, his testimony as an expert is precluded.

RESIDENTIAL CAPITAL, LLC, ET AL.

10

1 The record is clear that his legal advice or his legal opinions
2 did not form the basis for Mr. Kruger's decision to enter into
3 the proposed FGIC settlement. Mr. Lipps was not permitted to
4 testify about any prior legal advice he'd given to the debtors
5 with respect to any of the matters as to which he had
6 previously represented them. If he was to testify as an
7 expert, the Court concludes, essentially for the reasons I set
8 forth in an earlier published opinion on April 12th, 2013, in
9 response to the committee's preclusion motion -- if he was
10 going to testify and give legal opinions as an expert, I would
11 require that he be examined on all advice he had given to the
12 debtors on any of the subject matters about the RMBS cases.

13 Additionally, the Court does not believe that much of
14 Mr. Lipps' direct testimony -- and that's in his July 31,
15 2013 -- the direct testimony that was provided to the Court --
16 is an appropriate subject for expert testimony.

17 The debtor argues that the only thing that would be
18 precluded is the ultimate legal issues. But for the purposes
19 of a 9019 hearing, the legal issues indeed are the strengths
20 and weaknesses of the claims and defenses. That's precisely
21 what Mr. Lipps is testifying about.

22 With that said, for the reasons I've just explained,
23 the motion in limine to preclude the direct testimony of
24 Jeffrey A. Lipps dated July 31, 2013 is granted in part and
25 denied in part. Lipps will not be permitted to testify as an

RESIDENTIAL CAPITAL, LLC, ET AL.

11

1 expert witness; but portions of his testimony, as will be
2 identified in a written order that will be entered immediately
3 after the hearing, will be admitted into evidence as fact
4 witness testimony. Portions of his testimony as identified
5 paragraph number will be excluded from evidence for the reasons
6 I've given -- the expert portions. And portions of the
7 testimony, as will be identified by paragraph number will not
8 be admitted into evidence, but will be considered by the Court
9 as part of the legal arguments of the debtors in support of
10 approval of the FGIC Rule 9019 settlement.

11 While I think that -- I mean, Mr. Lipps' direct
12 testimony much reads like a brief, and that's exactly how the
13 Court's going to treat it, and I believe it's appropriate to
14 treat it, so I will enter an order to that effect. And I also
15 want to make clear that to the extent that the specific
16 paragraphs are not being admitted into evidence but will be
17 considered as legal argument, they will not be subject to
18 cross-examination at trial either. The objectors having made
19 their motion, they now will be precluded from cross-examining
20 on those subjects. Those will be -- those are essentially
21 legal arguments that more properly belonged in a brief.

22 But the written order will be entered. It will
23 reflect each and every paragraph. In some paragraphs, certain
24 sentences are carved out. All right.

25 The motion to preclude the testimony of S.P. Kothari

RESIDENTIAL CAPITAL, LLC, ET AL.

12

1 is denied. The investor parties, joined by Freddie Mac, argue
2 that Kothari's opinions are unreliable because he failed to
3 identify -- independently verify the method used to arrive at
4 the 253.3 million commutation payment amount, he failed to
5 conduct an independent analysis of the discount rate used by
6 Duff & Phelps, he failed to analyze FGIC's potential litigation
7 recoveries, his opinion about price declines and FGIC-wrapped
8 securities post-settlement agreement is an impermissible ipse
9 dixit conclusion, and he failed to verify the accuracy of the
10 underlying information he relied on.

11 The investor parties also argue that Kothari's opinion
12 is not relevant because he offers no opinion on whether the
13 settlement agreement is in the best interests of investors or
14 whether the trustees acted in good faith.

15 All of these arguments are reserved for cross-
16 examination. They do not overcome the admissibility of
17 Kothari's expert testimony, and therefore the motion is denied.

18 With respect to the motion to preclude the testimony
19 of Allen Pfeiffer, the motion is denied. The investor parties,
20 joined by Freddie Mac, seek to preclude the testimony of Allen
21 Pfeiffer. The investor parties' only argument is that the FGIC
22 trustees have withheld work product documents of Pfeiffer's
23 including facts and data that Pfeiffer considered or generated
24 in formulating his opinion as well as materials concerning the
25 development, foundation, or basis of those opinions, whether

RESIDENTIAL CAPITAL, LLC, ET AL.

13

1 Pfeiffer considered them in formulating the opinions he
2 expressed or not.

3 Only Pfeiffer's primary work papers were produced, at
4 least initially. Moreover, on the evening of August 6th, the
5 FGIC trustees informed the investor parties they would finally
6 produce the requested material the next day, several gigabytes
7 of data. The investor parties argued that would give them
8 enough time to review the additional material.

9 It appears to the Court the FGIC trustees have now
10 produced all of the work papers Pfeiffer relied on in forming
11 his expert opinion in this case. Accordingly, the motion is
12 denied.

13 All right. The motion to preclude testimony on
14 reliance of counsel. The motion is denied. The investor
15 parties, joined by Freddie Mac, argue that the FGIC trustees
16 cannot produce any evidence at trial that they relied on
17 counsel in deciding to enter into the settlement with the
18 debtors and FGIC because they repeatedly withheld documents
19 that go to this point on the basis of attorney-client privilege
20 and instructed witnesses not to answer on the basis of
21 attorney-client privilege.

22 The investor parties point to the declarations made by
23 the FGIC trustees in the context of the hearing on approval of
24 the plan support agreement and quote several statements from
25 those declarations or depositions in which the declarant said

RESIDENTIAL CAPITAL, LLC, ET AL.

14

1 that he or she relied on the advice of counsel in deciding to
2 enter into the settlement.

3 In addition, while this motion focuses most of its
4 attention on the FGIC trustee's witnesses, the investor parties
5 also argue that the debtors relied on counsel -- on the advice
6 of Jeffrey Lipps, but refused to produce the documents
7 considered by Lipps in forming his opinion.

8 Moreover, the investor parties argue that the trustees
9 cannot prove that they acted reasonably and in good faith
10 because they sought guidance from their legal advisors before
11 approving the FGIC settlement agreement.

12 Second Circuit law is clear that a party may not
13 assert that it believed it acted in good faith and
14 simultaneously claim privilege to block inquiry into the
15 party's state of mind. By insisting that the Court make the
16 requested findings, the FGIC trustees -- this is the argument
17 that's been made, not my conclusions. Okay? The investor
18 parties argue that the FGIC trustees have elected to put their
19 state of mind at issue and that that necessarily implicated the
20 substance of the counsel communications.

21 As the Court has already established in an earlier
22 preclusion opinion in this case, parties may introduce evidence
23 that they sought and received the advice of counsel, but they
24 cannot put forth evidence of the substance of that advice and
25 argue that they relied on it in entering into the settlement

RESIDENTIAL CAPITAL, LLC, ET AL.

15

1 without waiving the attorney-client privilege.

2 The Court concludes that the direct testimony and
3 declarations submitted by the settling parties do not divulge
4 the substance of those attorney-client communications nor do
5 they argue that they relied on advice of counsel in entering
6 into the settlement. To the extent the parties put forth
7 reliance of counsel evidence at trial, any party can object on
8 that basis. Accordingly, the motion in limine is denied.

9 All right. The motion to preclude testimony of
10 reliance on mediation negotiations. The motion is denied.

11 Similar to their objection to reliance on counsel
12 evidence coming in at trial, the investor parties, joined by
13 Freddie Mac, asked this Court to preclude any argument or
14 evidence at the settlement hearing concerning the mediation and
15 any testimony about the parties' conduct during those
16 negotiations. The investor parties claim that they've been
17 blocked from learning about anything that was discussed,
18 exchanged, proposed, considered, or evaluated by any of the
19 parties to the mediation, including the negotiations that
20 eventually culminated in the FGIC settlement and the
21 commutation payment amount.

22 The investor parties specifically requested that the
23 Court preclude evidence in paragraphs 4, 6, 9 through 16, and
24 18 of the Dubel witness statement and exhibits referred to
25 therein; paragraphs 6 through 9 and 14 through 20 of the

RESIDENTIAL CAPITAL, LLC, ET AL.

16

1 Sohlberg declaration, and the exhibits referred to therein;
2 paragraphs 7 through 9, 12, 17 through 21, 23 through 24, of
3 the Major declaration, and the exhibits referred to therein;
4 paragraphs 5, 14 and 15, 25, 26, 28, 35 through 39, 41, 42 and
5 57 through 59 of the Kruger direct testimony, and the exhibits
6 referred to therein.

7 The parties to the FGIC settlement did not make a
8 voluntary decision to protect from discovery their confidential
9 negotiations during the mediation overseen by Judge Peck. The
10 mediation order, which is at ECF 2519, eliminated any choice in
11 the matter by strictly prohibiting the parties from divulging
12 any "discussions among any of the mediation parties"; "any
13 mediation statements and any other documents or information
14 provided to the mediator or the mediation parties in the course
15 of the mediation"; or any "correspondence, draft resolutions,
16 offers, and counter-offers produced for or as a result of the
17 mediation." See mediation order at paragraph 4.

18 General Order M-390 imposes a similar prohibition.
19 "Any statements made by the mediator, by the parties, or by
20 others during the mediation process shall not be divulged by
21 any of the participants in the mediation (or their agents) or
22 by the mediator to the Court or to any third party." That's
23 General Order M-390, section 5.1.

24 Moreover, the evidence concerning the mediation
25 process, that is, the general nature and characteristics of the

RESIDENTIAL CAPITAL, LLC, ET AL.

17

1 mediation, is admissible. The parties are not attempting to
2 introduce evidence of any of the oral or written communications
3 made in the course of the mediation. Accordingly, the Court
4 denies the motion.

5 Freddie Mac's motion to preclude testimony of Ron
6 D'Vari is denied. In addition to joining in the in limine
7 motions filed by the investor parties, Freddie Mac seeks to
8 preclude certain aspects of the testimony of Ron D'Vari.
9 D'Vari's firm was a consultant and advisor to FGIC until late
10 2011. The firm was hired to run stress loss analysis, which
11 formed the basis of the FGIC rehabilitation plan term sheet
12 that FGIC and the steering committee in the rehabilitation
13 proceeding, of which Freddie Mac was an adjunct member,
14 submitted to the New York Department of Financial Services.
15 The term sheet formed the basis of FGIC's rehabilitation plan.

16 Sometime after the filing of the rehabilitation plan,
17 NewOak commenced providing services to the debtor, analyzing
18 the same ResCap trusts. Freddie Mac's main argument in its
19 motion is that D'Vari has changed his expert testimony and
20 should not be allowed to do so. Specifically, D'Vari, one of
21 the debtors' expert witnesses, submitted a declaration on June
22 11th, 2013 in which he opined that he believed "a conservative
23 estimate of the aggregate amount of the claims" -- I'll put
24 this in brackets -- [related to collateral losses] -- "released
25 by the FGIC trustees, under the settlement agreement, is

RESIDENTIAL CAPITAL, LLC, ET AL.

18

1 5,001,609,304 dollars."

2 However, in D'Vari's direct testimony, D'Vari said
3 that the figure I just gave, "does not reflect an analysis of
4 the potential losses to wrapped bonds," which they argue
5 contradicts his declaration, and is not adequately addressed in
6 his direct testimony, according -- that's according to Freddie
7 Mac. Therefore, Freddie Mac asked that the Court preclude
8 D'Vari's statement regarding the five-billion-plus figure.

9 To the extent Freddie Mac is objecting to D'Vari on
10 the basis that he cannot be an objective witness, the Court
11 denies the motions for the reasons that I will outline shortly
12 when ruling on the JSN's in limine motion. In addition,
13 Freddie Mac's motion concerning shifts in D'Vari's testimony
14 should be reserved for cross-examination and do not overcome
15 the admissibility of D'Vari's expert witness testimony.
16 Accordingly the motion is denied. All right.

17 With respect to the Junior Secured Noteholders'
18 preclusion motion, it's granted in part and denied in part.
19 The JSN -- it's granted with respect to the Lipps testimony
20 that I've already ruled.

21 The JSNs argue in the motion that the debtors and FGIC
22 should be precluded from offering evidence regarding the basis
23 of their business judgment in the merits of the settlement
24 agreement, and the debtors should be precluded from offering
25 the testimony of D'Vari and Lipps because they are both,

RESIDENTIAL CAPITAL, LLC, ET AL.

19

1 according to the JSNs, conflicted. D'Vari because he was
2 retained by FGIC with respect to the same trust to which he
3 seeks to give expert testimony; and Lipps was retained by the
4 debtors on the same issues to which he seeks to give expert
5 testimony.

6 As to the first argument, the JSNs essentially argue
7 that this evidence should be precluded because the debtors did
8 not produce a single substantive e-mail, letter, presentation,
9 spreadsheet, term sheet, or draft agreement relating to the
10 settlement agreement. Moreover, during the deposition of the
11 debtors' CRO, Mr. Kruger, the JSNs argue that debtors' counsel
12 prohibited inquiry into the substance of the mediation and
13 settlement agreement communications.

14 They make the same argument with respect to FGIC's
15 CEO, John Dubel, in that his -- they argue his testimony was
16 restricted by his counsel's instruction not to answer questions
17 about the substance of the mediation or the FGIC settlement on
18 the grounds of attorney-client communication and mediation
19 privilege. The JSNs argue that portions of these individuals'
20 direct testimony should be precluded. See the JSNs' motion in
21 limine, Exhibits A and B.

22 As to the second argument the debtors have offered Ron
23 D'Vari as an expert witness with respect to the lifetime
24 expected collateral losses of certain residential mortgage-
25 backed securities issued by those trusts which are not insured

RESIDENTIAL CAPITAL, LLC, ET AL.

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1 by FGIC, this is the very same subject matter of a detailed
2 analysis that D'Vari apparently performed for FGIC in 2011;
3 this according to the JSNs. Similarly, the Lipps testimony is
4 offered as to the potential costs and delays of litigating with
5 FGIC and the FGIC-insured trusts. But they argue, this is the
6 exact same subject area on which Lipps has previously provided
7 legal advice to the debtors as their retained Section 327(e)
8 counsel.

9 The Court denies the JSN motion as to the testimony of
10 Kruger and Dubel for the reasons outlined above. The Court
11 rejects the JSNs argument that D'Vari lacks objectivity to be
12 an expert. As FGIC's counsel highlighted in its letter to the
13 objecting parties dated July 29, 2013, see Freddie Mac's D'Vari
14 in limine motion Exhibit D, Dr. D'Vari, as an expert witness,
15 has testified that he did not consider, rely on, or use these
16 materials in preparing his expert opinion set forth in his
17 declaration in support of the pending Rule 9109 motion. Dr.
18 D'Vari testified that he did not consider or use any of this
19 work on the prior FGIC engagement informing his opinions. He
20 also testified that none of his staff at NewOak who worked on
21 the D'Vari expert declaration also worked on the prior FGIC
22 engagement. See D'Vari deposition transcript page 132 line 24
23 through 133 line 5; page 136 line 10 through 138 line 22; page
24 129 lines 6 through 22.

25 Accordingly the JSNs' in limine motion is denied as to

RESIDENTIAL CAPITAL, LLC, ET AL.

21

1 the testimony of Ron D'Vari. As to the testimony of Mr. Lipps,
2 the motion is granted in part, denied in part, to the extent
3 I've already described.

4 Mr. Sidman, let me just ask now. You resolved the
5 issue as to Gibson, is that --

6 MR. SIDMAN: Yes, Your Honor.

7 THE COURT: What about -- is Goldstein still
8 outstanding?

9 MR. SIDMAN: Goldstein is still outstanding, Your
10 Honor.

11 THE COURT: Okay. All right. Thank you. All right.

12 The Court has already been advised that the issues
13 with respect to the testimony of Scott Gibson have been
14 resolved and therefore the Court won't rule on it.

15 FGIC seeks to preclude the expert testimony of Charles
16 Goldstein, the investors' expert. Goldstein essentially
17 testifies that if the settlement is approved, investors in the
18 FGIC insured trusts, including Freddie Mac and the investor
19 parties, will receive a lower economic recovery than they
20 otherwise might under the FGIC rehabilitation plan, and that
21 for this reason, the settlement agreement is not in the best
22 interests of investors in the FGIC insured trusts.

23 However, according to FGIC, the Goldstein opinion
24 wrongly assumes that FGIC publicly identified one billion in
25 expected litigation recoveries when FGIC actually never

RESIDENTIAL CAPITAL, LLC, ET AL.

22

1 indicated any such expectation or projection.

2 Goldstein states in his opinion that he got this
3 figure from FGIC's March 31, 2013 quarterly statement. However
4 FGIC argues that in fact, the one-billion-dollar figure relates
5 not to loss mitigation activities, but to reimbursement
6 recoveries that FGIC estimated it would receive through the
7 waterfall provisions under the governing documents of the
8 various trusts insured by FGIC, from funds available from
9 projected collateral cash flows, and projected payments from
10 other providers of credit enhancement in the subject
11 transactions. Under the terms of the settlement agreement,
12 these substantial potential reimbursement recoveries, otherwise
13 payable to FGIC, will instead be payable to the FGIC-insured
14 trusts.

15 Goldstein -- it is argued that Goldstein completely
16 ignores the fact that the settlement agreement assigns FGIC's
17 right to these reimbursement recoveries to the investors. He
18 assumes that FGIC will retain these recoveries. See FGIC
19 opinion paragraph 27: "It is my understanding that FGIC may
20 receive significant reimbursements from projected cash flows
21 from the mortgage loans underlying the securities on which it
22 has paid."

23 In addition, FGIC further moves to preclude -- is the
24 Messer issue still open?

25 UNIDENTIFIED SPEAKER: Your Honor, that was resolved.

RESIDENTIAL CAPITAL, LLC, ET AL.

23

1 THE COURT: That's resolved.

2 UNIDENTIFIED SPEAKER: That was resolved by --

3 THE COURT: All right.

4 With respect to the Goldstein, the Court concludes
5 that all of the arguments should be reserved for cross-
6 examination and do not overcome Goldstein's admissibility as an
7 expert witness.

8 What about the issue about Holtzer?

9 MR. SIDMAN: Your Honor, that has not been resolved at
10 this point.

11 THE COURT: All right. With respect to Mr. Holtzer
12 being listed as an adverse witness, the Court will not preclude
13 the possible calling of Holtzer as an adverse witness. FGIC's
14 counsel can object to any questions that Holtzer is asked if he
15 is called as a witness.

16 So therefore, the motion in limine with respect to
17 Goldstein and Holtzer is denied without prejudice. I think
18 that resolves all of the motions in limine.

19 As I say, a separate order will be entered with
20 respect to the Lipps testimony, because it's a very long list
21 of paragraphs. So I'll deal with it there.

22 All right. Can somebody fill me in on the status of
23 the state court rehabilitation proceeding?

24 MR. KERR: It's not me, Your Honor.

25 THE COURT: Mr. Slack?

RESIDENTIAL CAPITAL, LLC, ET AL.

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1 MR. SLACK: Good afternoon, Your Honor. Richard Slack
2 from Weil, counsel for the rehabilitator of FIGC. The hearing
3 in the state court did take place on the 6th. It was not an
4 evidentiary hearing by ruling of the court. There was oral
5 argument. The parties were heard. And the court took the
6 matter under advisement and it has not ruled yet.

7 THE COURT: Did Justice Ling-Cohan give any indication
8 of when she was likely to rule?

9 MR. SLACK: She did not.

10 THE COURT: Okay. Thank you, Mr. Slack.

11 All right. The next issue I want to raise is the
12 deadline for approval of the FGIC settlement. As I understand
13 it, it currently is August 19. Am I correct in that?

14 MR. KERR: I think that's --

15 THE COURT: All right. It's going to have to be
16 extended. And the Court -- so you better work on it now. I
17 gather you need consent of parties, so you may blow the whole
18 thing up if you can't get the consent of the necessary parties.
19 The Court requests that you get an extension of that deadline
20 to September 16th, 2013.

21 It's the Court's hope to rule before then. But I want
22 to be sure that I've -- I've got a room full of exhibits,
23 transcripts, testimony. I plan to consider -- I was away on
24 vacation, wound up reading more motions in limine and things
25 than either I or my wife wished would happen. Fortunately I

RESIDENTIAL CAPITAL, LLC, ET AL.

25

1 was able to do that on my iPad, so it was e-mailed to me. But
2 there is a roomful of stuff inside. And I consider the issues
3 as serious issues and I plan to listen to the evidence at the
4 hearing and review the exhibits, deposition designations,
5 listen to the testimony. It's unrealistic to think that I'm
6 going to rule from the bench on Monday, August 19th. As I say,
7 advise me during the hearing whether the parties consent. If
8 they don't we may just call it off.

9 Okay. Next item on my agenda is the treatment of
10 confidential information during the trial. I conduct public
11 trials. Any pleading that you wish me to consider in ruling,
12 any trial exhibits, deposition designations, must be unsealed.
13 If they're previously filed -- and I want to be clear about
14 filed -- if they're previously -- so it doesn't mean that
15 everything that's been filed in connection with this FGIC
16 settlement has to be unsealed. But anything that you're asking
17 me to consider, if there's a brief in support or opposition to
18 approval of the settlement, if it's been filed in redacted
19 form, you have until 4 p.m. tomorrow to file it in unredacted
20 form.

21 Trial exhibits are not filed, but all trial exhibits
22 need to be presented to the Court in unredacted form.
23 Testimony will, at some point, go on ECF and deposition
24 designations do need to be filed. That's testimony. They need
25 to be filed in unredacted form.

RESIDENTIAL CAPITAL, LLC, ET AL.

26

1 So I am ordering the unsealing of any evidence or
2 arguments that will be offered in support of or in opposition
3 to approval of the 9019 settlement. In reaching that
4 conclusion, I've been reviewing unredacted -- I mean, we've
5 been -- where we didn't have them, my clerks have been asking
6 to have you forward things in unredacted form. I've been
7 reviewing them in unredacted form. And I expect when I rule,
8 there will be references to evidence in unredacted form that
9 will be part of the public record. So that's the Court's
10 ruling with respect to this will be a public trial.

11 Let me ask, are there any remaining issues concerning
12 deposition designations and counter-designations? I had the
13 McKool Smith letter raising the issue. Where do we stand?

14 MR. KERR: Your Honor, this is Charles Kerr of
15 Morrison & Foerster on behalf of the debtors. Let me just
16 bring you up to date. There was a meet-and-confer this
17 afternoon addressing deposition designations. I think there's
18 still some open issues on them. And so I'm not sure we've come
19 to consensus on that at all. But we will keep working on that.

20 I would like to just raise one thing that was raised
21 in the call today, and it may be moot in light of what Your
22 Honor just said. But the question of whether deposition
23 designations are appropriate in light of witnesses who are
24 actually going to come forward and testify, it's hard to do
25 redirect without knowing what's in the deposition designations

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27

1 versus what's being testified live. We're on a timed trial.
2 And so it's -- it seems to be that it's not consistent with
3 those requirements that there be deposition designations.

4 THE COURT: Well, the Federal Rules of Civil Procedure
5 indicate when depositions may be used. That's the rule I
6 follow. Okay? So if it's of an adverse party, it's
7 admissible -- deposition testimony is admissible. So follow
8 the Federal Rules of Civil Procedure.

9 It is a timed trial. And to the extent you all
10 feel -- I mean, so one of two things happens frequently with
11 deposition designations. If the parties can't agree on broad
12 use of deposition designations, if they insist on adhering to
13 what the Rules of Civil Procedure permit -- so if somebody
14 offers a deposition designation and I get an objection that
15 it's hearsay, that it doesn't come within the rules, I'll
16 consider it and rule on it appropriately.

17 So frequently what happens is, particularly with a
18 timed trial, the parties confer and they agree, will agree that
19 the deposition designations can be used, whether it's of an
20 adverse witness or not. There's still -- the witness still has
21 to be available for in-court testimony if somebody wishes to
22 cross-examine -- I'm not going to allow -- if a party offers a
23 deposition designation, I'm not going to let you repeat the
24 precise same testimony again. I only want to hear it once,
25 either by deposition or live. I don't know if that answers

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28

1 your question, Mr. Kerr.

2 MR. KERR: Well, one question I have, Your Honor, just
3 in terms of your procedure; to the extent that a party is going
4 to be offering deposition designations, would it be the Court's
5 expectation that it be read in?

6 THE COURT: No.

7 MR. KERR: No. Okay.

8 THE COURT: No, no, no, no, no, no.

9 MR. KERR: Okay. And so to the extent --

10 THE COURT: No, so you got -- you all have limited
11 time. And I will spare you -- spare everybody in the courtroom
12 having to sit through the reading of deposition testimony.
13 That's why they ought to -- the transcripts, if there are
14 designations and counter-designations, you ought to be color
15 coded. And provide me with the transcripts and I will read
16 them when you're not all sitting there.

17 MR. KERR: One final question, Your Honor. To the
18 extent there is a question or objection to a designation under
19 Rule 32(a), because it's not of a party -- a party's designee;
20 for example, some of the experts are not party designees under
21 that rule, should we -- how should we raise it? Should we
22 raise it at the time it's offered or --

23 THE COURT: Yes.

24 MR. KERR: Okay.

25 THE COURT: You haven't been able to work this issue

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29

1 out?

2 MR. KERR: Well, we're still working on it, Your
3 Honor. And we will commit to keep working on it.

4 THE COURT: Okay. Look, it's a bench trial. Whether
5 you think -- if somebody really wants to spend their time
6 cross-examining a witness on the witness stand because they
7 think they're going to score points, fine, let them do it. But
8 it's a bench trial. I'll read the deposition transcripts. But
9 I'll follow -- I will apply the rules as set forth in the Rules
10 of Civil Procedure with respect to deposition transcripts,
11 unless you all agree to a different result, which usually
12 happens. Okay?

13 MR. KERR: Your Honor, let me raise one other thing.

14 THE COURT: Go ahead.

15 MR. KERR: The parties have -- obviously have
16 identified trial exhibits. We have just, I think, today
17 exchanged some objections to those. We're still working on
18 those. We hope -- my hope is that we can resolve those. To
19 the extent we cannot, we'll bring them to Your Honor when the
20 objection's being offered.

21 THE COURT: That's all right.

22 MR. KERR: But we hope to resolve all that.

23 THE COURT: And let me make clear. With respect to
24 objections, I don't like speaking objections during trial. You
25 can state short legal objection. And if it's testimony I

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30

1 usually will rule promptly. If I want to hear an explanation
2 I'll ask for it. So I don't like speaking objections. If
3 there's an objection to an exhibit, you'll tell me briefly,
4 very briefly, what it is. Okay?

5 MR. KERR: Good. Thank you, Your Honor.

6 THE COURT: All right. Okay. All right.

7 MR. KERR: Your Honor, one other --

8 THE COURT: Go ahead, Mr. Kerr.

9 MR. KERR: -- thing. We have advised the other side
10 about the order of witnesses that we are going to call. I'm
11 expecting to get from the other side their order of witnesses.
12 We can provide that to the Court if --

13 THE COURT: I don't care to know, unless -- what I
14 wanted -- the reason I put that in this last order is I want
15 this to go as smoothly as possible. There's a lot of lawyers
16 involved. Frequently -- I hope what will happen is that
17 somebody's going to take primary responsibility for cross-
18 examination of a witness. I'm not going to have repe -- I
19 won't permit -- let me just tell you right now, I will not
20 permit repetitive cross-examination, even though you represent
21 different parties.

22 So what I usually expect is going to happen, and I
23 think it's most effective for all of you, is if you agree who's
24 going to take the lead, yes you may have some separate
25 questions that affect your client, I understand you want to do

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31

1 that. And there are a lot of lawyers involved, and they ought
2 to -- it works for everybody's advantage to know who the next
3 witness is, so you know I'm going to be up for cross -- cross-
4 examining that you're prepared. That's my goal. Okay?

5 I'm willing -- if you discuss if there are issues
6 about taking witnesses out of order, if the parties agree --
7 they usually do -- I usually will hear them out of order, if
8 there's some scheduling issue. But you all ought to know what
9 order the witnesses are going to be in and hopefully you're
10 each figuring out who's going to take the lead in cross-
11 examining. I don't know if that helps you, Mr. Kerr?

12 MR. KERR: It does, Your Honor. Thank you.

13 THE COURT: Okay. All right. Let me talk a little
14 bit about the treatment of the timed trial. I know my clerks
15 have gotten some questions about this. You should keep track
16 of your own time. I've indicated there's six hours allocated
17 to each side. Use it as you wish. At each break, my clerks
18 will typically confer with you and tell you what they believe
19 you've used. If you disagree, tell them. And I'm usually
20 keeping track of it as well.

21 So during -- what I usually try to do is, we're going
22 to start at 9. We'll take a fifteen-minute recess at some
23 point that seems convenient about halfway through the morning.
24 What I hope to do is get three hour hours of testimony in the
25 morning and three hours in the afternoon.

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32

1 Because of sequestration, we stop at 5 o'clock. If
2 you've got one or two questions that you need to finish, finish
3 them. But because of sequestration, we stop at 5.

4 Let me ask -- I've read all the briefs. I've been
5 reading the testimony. I can't say I've read every exhibit.
6 They -- I didn't have those while I was away. I came back and
7 they're here. Are counsel intending to make opening
8 statements? You don't need to. Let me put it this way. I've
9 read all the briefs. You may want to save your time and have
10 some time at the end. What's your pleasure, Mr. Kerr?

11 MR. KERR: Your Honor, it was my intention, but I'll
12 only do it if it's helpful to the Court, just to do a very
13 brief, kind of just --

14 THE COURT: That's fine.

15 MR. KERR: -- picture. But it'll be very brief.

16 THE COURT: I'm not going to preclude them. Just if
17 you want to do that, that's fine. Anybody else want to
18 indicate what you're going to do? Objectors? What do they --

19 UNIDENTIFIED SPEAKER: We were planning on doing very
20 brief --

21 THE COURT: Okay.

22 UNIDENTIFIED SPEAKER: -- opening statements, Your
23 Honor.

24 THE COURT: That's fine.

25 UNIDENTIFIED SPEAKER: Same here, Your Honor.

RESIDENTIAL CAPITAL, LLC, ET AL.

33

1 THE COURT: Okay. All right. One surprise for you
2 all. As I look at the mountain of evidence that I see in my
3 chambers, I'm going to require preparation of proposed findings
4 of fact and conclusions of law. And I'm going to set a
5 deadline for simultaneous submission of them of 10 a.m. August
6 26th, 2013. Somebody better order daily if you want. So I
7 want simultaneous filings. Provide the Court with an
8 electronic copy in Word format on CD or flash drive.

9 So you can have your minions trying to keep track of
10 the evidence as it's coming in. I'm just -- I've read a lot.
11 There's a lot more that I still have to look at and will look
12 at. We're on an expedited schedule. And setting that August
13 26th date, I set that before I set the September 16th date as
14 the deadline for -- that I want extended for decision on this
15 issue.

16 Let me open the floor. Are there issues that you all
17 want to raise? Mr. Kerr, anything you wanted to raise?

18 MR. KERR: Yeah, Your Honor. Just one issue in terms
19 of scheduling of witnesses. I just want to make the Court
20 aware of this. In the -- we had sent over an order of our
21 witnesses. One of the witness, or the trustee's witnesses, Mr.
22 Major, as I understand it, by regulation, he cannot work on
23 Friday. There's a federal regulation that prevents him to do
24 that, because he's a banking officer. We have said he -- he
25 has to appear on Monday. I -- so I just -- that may be a

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34

1 witness that may --

2 THE COURT: That's one of the -- I'm willing to take
3 witnesses out of order. I mean -- are we going to have
4 objections from the opponents of the settlement to having Mr.
5 Major testify out of order?

6 UNIDENTIFIED SPEAKER: No, Your Honor. We don't stand
7 in the way of federal rules.

8 MR. KERR: Even I was surprised by that, Your Honor.
9 I was --

10 THE COURT: I'm not surprised at anything.

11 MR. KERR: That's it, Your Honor.

12 THE COURT: Okay. Anything that anybody else wants to
13 raise?

14 I think -- I was told by the IT people that somebody's
15 been here trying to set up their technology in the courtroom.
16 We do have some technology in the courtroom. Any exhibits --
17 and they -- who's using that? Everybody? Nobody? Ms. Eaton?

18 MS. EATON: We may use it, Your Honor.

19 THE COURT: Okay. So I know, because they came to see
20 me to ask about -- did I want another monitor on here, and I
21 said no, because I'm able -- any exhibit that you display by
22 computer or the overhead camera that's there, gets displayed on
23 my monitor, the monitor on the witness stand, and there's a
24 large screen monitor in the back of the courtroom.

25 I will also have lots of documents out here. So in

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35

1 addition to wanting to see it on the screen, I do want you to
2 identify the exhibit by number. I hope I have been clear.
3 Everything needs to be pre-marked. We don't have a reporter
4 who can mark anything.

5 So you're welcome to use a computer. If you want to
6 use PowerPoint in openings or closings or anything like that,
7 be my guest. If you want to display exhibits for the witness,
8 I will see it at the same time on my screen.

9 Anybody have any logistic quest -- so the courthouse
10 opens at 8:30. That's when you can get in the door downstairs.
11 So it gives you a half hour to -- you're welcome to bring
12 things tomorrow, if you want. I have a calendar -- the
13 calendar ends at 3 o'clock tomorrow. So or you can arrange for
14 somebody to come in lunchtime. If there are things you want to
15 bring in tomorrow, because the half hour before the court
16 opens, feel free to do it.

17 Let's not try and create a firetrap in doing it. The
18 courtroom is locked at night, so whatever is in here should be
19 safe. But I can't -- obviously, can't guarantee all of that,
20 but we do keep the courtroom locked.

21 MR. KERR: Your Honor, if I -- this is Charles Kerr
22 again. If I can ask one other question. Just a logistical
23 question and ease. It was our intention in putting on a
24 witness we would offer his direct, offer in -- like Mr.
25 Kruger -- offer in the exhibits that are referred to in his

RESIDENTIAL CAPITAL, LLC, ET AL.

36

1 direct, and then assuming they're in or whether they are not, I
2 was intending to have a binder of that material provided to Mr.
3 Kruger, to yourself, and the other counsel here, so he can
4 refer to that during the course of his cross-examination and
5 redirect, if that's okay.

6 THE COURT: That's absolutely appropriate. And if, in
7 cross, you have any additional exhibits you want -- I've asked
8 if -- unless you think you've got some surprise smoking gun
9 that you want to spring on a witness, which I haven't seen
10 happen yet, but if you do, I'd like all the exhibits put in
11 front of the witness at the start, and in front of me, so it's
12 easy to find. I already made clear that you don't have to ask
13 for permission to approach the witness. That sort of thing.

14 MR. KERR: Thank you, Your Honor.

15 THE COURT: Okay. Anybody else have any other
16 logistics? We'll see you all Friday morning. We're adjourned.

17 (Whereupon these proceedings were concluded at 4:47 PM)
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I N D E X

RULINGS

	Page	Line
Motion in limine to preclude testimony of Jeffrey Lipps is granted in part and denied in part	9	23
Motion in limine to preclude the testimony of S.P. Kothari is denied	11	26
Motion in limine to preclude testimony of Allen Pfeiffer is denied.	12	18
Motion in limine to preclude testimony on reliance of counsel is denied.	13	13
Motion in limine to preclude testimony of reliance on mediation negotiations is denied.	15	10
Freddie Mac's motion to preclude testimony of Ron D'Vari is denied	17	6
The JSN's preclusion motion is granted in part regarding Lipps and denied in part.	18	18
FGIC's motion to preclude the expert testimony of Charles Goldstein is denied	23	4
Motion in limine with respect to Goldstein and Holtzer is denied without prejudice	23	16

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RULINGS

	Page	Line
All evidence or arguments must be presented	26	1
in unredacted form and unsealed by 4 p.m.		
August 15.		

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C E R T I F I C A T I O N

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4

I, Penina Wolicki, certify that the foregoing transcript is a
5 true and accurate record of the proceedings.

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Penina Wolicki

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PENINA WOLICKI

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AAERT Certified Electronic Transcriber CET**D 569

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Date: August 15, 2013

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August 14, 2013

	25:7	13:9	August (5)	bonds (1)
[advised (2)	apply (1)	13:4;24:13;25:6;	18:4
[related (1)	21:12;30:9	29:9	33:5,12	both (1)
17:24	advisement (1)	approach (1)	available (2)	18:25
	24:6	36:13	22:8;27:21	brackets (1)
A	advisor (1)	appropriate (4)	Avenue (5)	17:24
	17:9	10:16;11:13;26:23;	4:3;5:13;6:14;7:4,	break (1)
	advisors (1)	36:6	12	31:17
able (3)	14:10	appropriately (1)	aware (2)	brief (6)
25:1;28:25;34:21	affect (1)	27:16	8:9;33:20	11:12,21;25:17;
above (1)	30:25	approval (5)	away (2)	32:13,15,20
20:10	afternoon (3)	11:10;13:23;24:12;	24:23;32:6	briefly (2)
absolutely (1)	24:1;26:17;31:25	25:18;26:3		30:3,4
36:6	again (2)	approved (1)	B	briefs (2)
according (5)	27:24;35:22	21:17		32:4,9
18:6,6;19:1;20:3;	agenda (2)	approving (1)	back (2)	bring (4)
21:23	8:7;25:9	14:11	32:6;34:24	26:16;29:19;35:11,
Accordingly (5)	agents (1)	April (1)	backed (1)	15
13:11;15:8;17:3;	16:21	10:8	19:25	broad (1)
18:16;20:25	aggregate (1)	area (1)	BAIO (1)	27:11
accuracy (1)	17:23	20:6	6:17	Bryant (1)
12:9	agree (7)	argue (15)	BAKER (1)	6:4
acted (3)	9:12;27:11,18,18;	12:1,11;13:15;	6:8	business (1)
12:14;14:9,13	29:11;30:23;31:6	14:5,8,18,25;15:5;	Bank (3)	18:23
activities (1)	agreement (14)	18:4,21;19:6,11,15,	4:21;5:3,12	
22:5	8:21;9:8;12:8,13;	19:20:5	banking (1)	C
actually (2)	13:24;14:11;17:25;	argued (2)	33:24	
21:25;26:24	18:24;19:9,10,13;	13:7;22:15	basis (9)	CA (1)
Ad (1)	21:21;22:11,16	argues (2)	10:2;12:25;13:19,	7:14
4:2	ahead (3)	10:17;22:4	20;15:8;17:11,15;	calendar (2)
addition (5)	9:2;29:14;30:8	argument (10)	18:10,22	35:12,13
14:3;17:6;18:12;	Allen (2)	11:17;12:21;14:16;	Battery (1)	call (4)
22:23;35:1	12:19,20	15:13;17:18;19:6,14,	5:4	9:13;25:8;26:21;
additional (2)	allocated (1)	22:20;11;24:5	Bayview (1)	30:10
13:8;36:7	31:16	arguments (5)	6:13	called (1)
Additionally (1)	allow (1)	11:9,21;12:15;	behalf (1)	23:15
10:13	27:22	23:5;26:2	26:15	calling (1)
addressed (1)	allowed (1)	arrange (1)	belonged (1)	23:13
18:5	17:20	35:13	11:21	came (2)
addressing (1)	ALSTON (1)	arrive (1)	bench (3)	32:6;34:19
26:17	4:20	12:3	25:6;29:4,8	camera (1)
adequately (1)	Americas (2)	aspects (1)	BENNETT (1)	34:22
18:5	4:3;5:13	17:8	4:17	can (14)
adhering (1)	among (1)	assert (1)	Berkshire (1)	8:9;15:7;23:14,22;
27:12	16:12	14:13	7:11	27:19;29:18,25;
adjoined (1)	amount (3)	assigns (1)	best (2)	30:12;33:9;35:4,10,
36:16	12:4;15:21;17:23	22:16	12:13;21:21	13,22;36:3
adjunct (1)	analysis (4)	assumes (2)	better (2)	Capital (1)
17:13	12:5;17:10;18:3;	21:24;22:18	24:16;33:6	8:3
admissibility (3)	20:2	assuming (1)	billion (1)	care (1)
12:16;18:15;23:6	analyze (1)	36:1	21:24	30:13
admissible (3)	12:6	Atlanta (1)	binder (1)	CARNEY (2)
17:1;27:7,7	analyzing (1)	4:23	36:2	6:9;9:15
admitted (3)	17:17	attempting (1)	BIRD (1)	carved (1)
11:3,8,16	Angeles (1)	17:1	4:20	11:24
advantage (1)	7:14	attention (1)	bit (1)	CASE (3)
31:2	ANN (1)	14:4	31:14	4:1;13:11;14:22
adverse (4)	6:8	attorney-client (5)	block (1)	cases (1)
23:12,13;27:6,20	apparently (1)	13:19,21;15:1,4;	14:14	10:12
advice (9)	20:2	19:18	blocked (1)	cash (2)
10:1,4,11;14:1,5,	appear (1)	Attorneys (10)	15:17	22:9,20
23,24;15:5;20:7	33:25	4:2,11,21;5:3,12,	blow (1)	CD (1)
advise (1)	appears (1)	21:6;3,13;7:3,11	24:17	33:8

August 14, 2013

CEO (1) 19:15 certain (3) 11:23;17:8;19:24 chambers (1) 33:3 changed (1) 17:19 characteristics (1) 16:25 Charles (3) 21:15;26:14;35:21 choice (1) 16:10 CHRISTOPHER (1) 4:6 Circuit (1) 14:12 Civil (4) 27:4,8,13;29:10 claim (2) 14:14;15:16 claims (2) 10:20;17:23 clear (7) 10:1;11:15;14:12; 25:13;29:23;35:2; 36:12 clerks (3) 26:5;31:14,17 client (1) 30:25 closings (1) 35:6 coded (1) 28:15 collateral (3) 17:24;19:24;22:9 color (1) 28:14 coming (2) 15:12;33:10 commenced (1) 17:17 commit (1) 29:3 committee (1) 17:12 committee's (1) 10:9 communication (1) 19:18 communications (4) 14:20;15:4;17:2; 19:13 commutation (2) 12:4;15:21 completely (1) 22:15 complicated (2) 8:13;9:22 computer (2) 34:22;35:5	concerning (5) 12:24;15:14;16:24; 18:13;26:11 concluded (1) 36:17 concludes (3) 10:7;15:2;23:4 conclusion (2) 12:9;26:4 conclusions (2) 14:17;33:4 conduct (3) 12:5;15:15;25:10 confer (4) 8:20;23;27:18; 31:18 conference (1) 9:3 confidential (2) 16:8;25:10 conflicted (1) 19:1 connection (1) 25:15 consensus (1) 26:19 consent (3) 24:17,18;25:7 conservative (1) 17:22 consider (7) 20:15,18;24:23; 25:2,11,17;27:16 considered (6) 11:8,17;12:23; 13:1;14:7;15:18 consistent (1) 27:2 consultant (1) 17:9 context (1) 13:23 contradicts (1) 18:5 convenient (1) 31:23 copy (1) 33:8 correspondence (1) 16:15 costs (1) 20:4 counsel (17) 9:8;13:14,17;14:1, 5,20,23;15:5,7,11; 19:11;20:8,12;23:14; 24:2;32:7;36:3 counsel's (1) 19:16 counter- (1) 8:24 counter-designations (2) 26:12;28:14	counter-offers (1) 16:16 course (3) 16:14;17:3;36:4 COURT (73) 8:2,23;9:2,4,11,17, 19:10;7,13,15;11:8; 13:9;14:15,21;15:2, 13,23;16:22;17:3; 18:7,10;20:9,10;21:7, 11,12,14;23:1,3,4,11, 12,23,25;24:3,4,5,7, 10,15,16,19;25:22; 27:4;28:6,8,10,23,25; 29:4,14,21,23;30:6,8, 12,13;31:13;32:12, 14,16,21,24;33:1,7, 19;34:2,10,12,19; 35:15;36:6,15 courthouse (1) 35:9 courtroom (6) 28:11;34:15,16,24; 35:18,20 Court's (4) 11:13;24:21;26:9; 28:4 cover (1) 8:6 CQS (1) 6:13 create (1) 35:17 credit (1) 22:10 CRO (1) 19:11 cross (2) 31:3;36:7 cross- (5) 12:15;23:5;30:17; 31:3,10 cross-examination (4) 11:18;18:14;30:20; 36:4 cross-examine (1) 27:22 cross-examining (2) 11:19;29:6 culminated (1) 15:20 currently (1) 24:13	10:24;20:13 DAVID (1) 5:25 DAY (3) 4:10;9:7;13:6 deadline (4) 24:12,19;33:5,14 deal (2) 9:20;23:21 debtor (2) 10:17;17:17 debtors (12) 10:4,12;11:9; 13:18;14:5;18:21,24; 19:4,7,22;20:7;26:15 debtors' (3) 17:21;19:11,11 DECHERT (1) 5:11 deciding (2) 13:17;14:1 decision (3) 10:2;16:8;33:14 decisions (1) 8:11 declarant (1) 13:25 declaration (6) 16:1,3;17:21;18:5; 20:17,21 declarations (3) 13:22,25;15:3 declines (1) 12:7 defenses (1) 10:20 delays (1) 20:4 denied (15) 9:23;10:25;12:1, 17,19;13:12,14;15:8, 10;17:6;18:16,18; 20:25;21:2;23:17 denies (3) 17:4;18:11;20:9 Department (1) 17:14 deposition (22) 8:24;19:10;20:22; 25:4,12,23;26:12,17, 22,25;27:3,7,11,12, 14,19,23,25;28:4,12; 29:8,10 depositions (2) 13:25;27:5 described (1) 21:3 designation (3) 27:14,23;28:18 designations (15) 8:24,25;25:4,12, 24;26:12,17,23,25; 27:3,11,12,19;28:4,	14 designee (1) 28:19 designees (1) 28:20 detailed (1) 20:1 development (1) 12:25 different (2) 29:11;30:21 direct (11) 10:14,15,23;11:11; 15:2;16:5;18:2,6; 19:20;35:24;36:1 disagree (1) 31:19 discount (1) 12:5 discovery (1) 16:8 discuss (1) 31:5 discussed (1) 15:17 discussions (1) 16:12 display (2) 34:21;35:7 displayed (1) 34:22 divulge (1) 15:3 divulged (1) 16:20 divulging (1) 16:11 dixit (1) 12:9 documents (6) 12:22;13:18;14:6; 16:13;22:7;34:25 dollars (1) 18:1 door (1) 35:10 downstairs (1) 35:10 Dr (2) 20:14,17 draft (2) 16:15;19:9 drive (1) 33:8 Dubel (3) 15:24;19:15;20:10 Duff (1) 12:6 during (9) 15:15;16:9,20; 19:10;25:7,10;29:24; 31:21;36:4 D'Vari (17)
--	--	--	--	---

August 14, 2013

17:6,8,19,20;18:2, 9,25;19:1,23;20:2,11, 13,14,18,21,22;21:1 D'Vari's (5) 17:9;18:2,8,13,15	4:6,7,15,16,17,25; 5:7,8,16,17,25;6:8,9, 17,18,19;7:7,16 essentially (4) 10:7;11:20;19:6; 21:16 established (1) 14:21 estimate (1) 17:23 estimated (1) 22:6 evaluated (1) 15:18 even (2) 30:20;34:8 evening (1) 13:4 eventually (1) 15:20 everybody (2) 28:11;34:17 everybody's (1) 31:2 evidence (20) 11:3,5,8,16;13:16; 14:22,24;15:7,12,14, 23;16:24;17:2;18:22; 19:7;25:3;26:1,8; 33:2,10 evidentiary (1) 24:4 exact (1) 20:6 exactly (1) 11:12 examination (3) 12:16;23:6;30:18 examined (1) 10:11 examining (2) 31:4,11 example (1) 28:20 exchanged (2) 15:18;29:17 excluded (1) 11:5 Exhibit (5) 20:14;30:3;32:5; 34:21;35:2 exhibits (16) 15:24;16:1,3,5; 19:21;24:22;25:4,12, 21,21;29:16;34:16; 35:7,25;36:7,10 expect (2) 26:7;30:22 expectation (2) 22:1;28:5 expected (2) 19:24;21:25 expecting (1)	30:11 expedited (1) 33:12 expert (22) 9:25,25;10:7,10, 16;11:1,6;12:17; 13:11;17:19,21; 18:15;19:3,4,23; 20:12,14,16,21; 21:15,16;23:7 experts (1) 28:20 explained (1) 10:22 explanation (1) 30:1 expressed (1) 13:2 extended (2) 24:16;33:14 extension (1) 24:19 extent (10) 9:24;11:15;15:6; 18:9;21:2;27:9;28:3, 9,18;29:19	fifteen-minute (1) 31:22 Fifth (1) 7:4 FIGC (1) 24:2 figure (4) 18:3,8;22:3,4 figuring (1) 31:10 file (1) 25:19 filed (8) 17:7;25:13,14,15, 18,21,24,25 filing (1) 17:16 filings (1) 33:7 fill (1) 23:22 final (1) 28:17 finally (1) 13:5 Financial (1) 17:14 find (1) 36:12 findings (2) 14:16;33:3 fine (4) 29:7;32:14,17,24 finish (2) 32:2,2 firetrap (1) 35:17 firm (2) 17:9,10 First (4) 8:8;9:20,24;19:6 five (1) 8:15 five-billion-plus (1) 18:8 flash (1) 33:8 Floor (3) 6:5;7:13;33:16 flows (2) 22:9,20 focuses (1) 14:3 Foerster (1) 26:15 follow (3) 27:6,7;29:9 forget (1) 9:13 form (8) 10:2;25:19,20,22, 25;26:6,7,8 format (1)	33:8 formed (2) 17:11,15 forming (2) 13:10;14:7 formulating (2) 12:24;13:1 forth (5) 10:8;14:24;15:6; 20:16;29:9 Fortunately (1) 24:25 forward (2) 26:6,24 foundation (1) 12:25 Freddie (17) 5:21;6:3;8:16;12:1, 20;13:15;15:13;17:5, 7,13,18;18:6,7,9,13; 20:13;21:18 free (1) 35:16 frequently (3) 27:10,17;30:16 Friday (3) 8:10;33:23;36:16 front (2) 36:11,11 full (1) 24:22 fully (1) 8:10 funds (1) 22:8 further (1) 22:23
E		F		G
earlier (2) 10:8;14:21 ease (1) 35:23 East (2) 4:12;5:22 easy (1) 36:12 EATON (3) 6:18;34:17,18 ECF (2) 16:10;25:23 economic (1) 21:19 effect (1) 11:14 effective (1) 30:23 either (3) 11:18;24:25;27:25 elected (1) 14:18 electronic (1) 33:8 eliminated (1) 16:10 else (3) 32:17;34:12;36:15 e-mail (1) 19:8 e-mailed (1) 25:1 EMMA (1) 6:19 end (1) 32:10 ends (1) 35:13 engagement (2) 20:19,22 enhancement (1) 22:10 enough (1) 13:8 enter (4) 10:2;11:14;13:17; 14:2 entered (5) 8:5,13;11:2,22; 23:19 entering (2) 14:25;15:5 ESPANA (1) 5:17 ESQ (18)		fact (4) 11:3;22:4,16;33:4 facts (1) 12:23 failed (4) 12:2,4,6,9 faith (3) 12:14;14:9,13 Fargo (1) 4:21 FARR (1) 6:12 Federal (4) 27:4,8;33:23;34:7 feel (2) 27:10;35:16 FGIC (47) 4:11;7:3;8:18;9:7; 10:3;11:10;12:21; 13:5,9,15,18,23;14:4, 11,16,18;15:20;16:7; 17:9,11,12,25;18:21; 19:2,17;20:1,2,5,19, 21;21:15,18,20,22, 23,24,25;22:4,6,8,13, 18,18,19,23;24:12; 25:15 FGIC-insured (2) 20:5;22:13 FGIC's (7) 12:6;17:15;19:14; 20:12;22:3,16;23:13 FGIC-wrapped (1) 12:7	findings (2) 14:16;33:3 fine (4) 29:7;32:14,17,24 finish (2) 32:2,2 firetrap (1) 35:17 firm (2) 17:9,10 First (4) 8:8;9:20,24;19:6 five (1) 8:15 five-billion-plus (1) 18:8 flash (1) 33:8 Floor (3) 6:5;7:13;33:16 flows (2) 22:9,20 focuses (1) 14:3 Foerster (1) 26:15 follow (3) 27:6,7;29:9 forget (1) 9:13 form (8) 10:2;25:19,20,22, 25;26:6,7,8 format (1)	GA (1) 4:23 GALLAGHER (1) 6:12 gather (1) 24:17 gave (1) 18:3 GELFARB (1) 5:25 General (3) 16:18,23,25 generated (1) 12:23 gets (1) 34:22 Gibson (3) 9:10;21:5,13 gigabytes (1) 13:6 given (3) 10:4,11;11:6 gives (1)

35:11 goal (1) 31:4 Goldstein (10) 21:7,9,16,16,23; 22:2,15,15,23:4,17 Goldstein's (1) 23:6 good (5) 12:14;14:9,13; 24:1,30:5 GOTSHAL (1) 7:2 governing (1) 22:7 Grand (1) 7:12 granted (5) 9:22;10:24;18:18, 19:21:2 grounds (1) 19:18 Group (1) 4:2 guarantee (1) 35:19 guest (1) 35:7 guidance (1) 14:10 gun (1) 36:8	20:12 hired (1) 17:10 Hoc (1) 4:2 Holtzer (5) 23:8,11,13,14,17 Honor (31) 8:19;9:6,7,16,18; 21:6,10;22:25;23:9, 24:24:1;26:14,22; 28:2,17;29:3,13,19; 30:5,7;31:12;32:11, 23,25;33:18;34:6,8, 11,18;35:21;36:14 HOOPER (1) 5:8 hope (7) 24:21;29:18,18,22; 30:16;31:24;35:2 hopefully (1) 31:9 hour (3) 31:24;35:11,15 hours (3) 31:16,24,25 HOWARD (2) 4:15;9:6	22:1;31:16 indication (1) 24:7 individuals' (1) 19:19 information (3) 12:10;16:13;25:10 informed (1) 13:5 informing (1) 20:19 initially (1) 13:4 inquiry (2) 14:14;19:12 inside (1) 25:2 insist (1) 27:12 insisting (1) 14:15 instead (1) 22:13 instructed (1) 13:20 instruction (1) 19:16 insured (4) 19:25;21:18,22; 22:8 intending (2) 32:7;36:2 intention (2) 32:11;35:23 interests (2) 12:13;21:22 interrupt (1) 8:20 into (10) 10:2;11:3,8,16; 13:17;14:2,14,25; 15:6;19:12 introduce (2) 14:22;17:2 investor (17) 8:15;12:1,11,19, 21;13:5,7,14,22;14:4, 8,17;15:12,16,22; 17:7;21:18 investors (4) 12:13;21:17,22; 22:17 investors' (1) 21:16 involved (2) 30:16;31:1 iPad (1) 25:1 ipse (1) 12:8 issue (12) 8:22;9:9;14:19; 21:5;22:24;23:8;	24:11;26:13;28:25; 31:8;33:15,18 issued (1) 19:25 issues (10) 10:18,19;19:4; 21:12;25:2,3;26:11, 18;31:5;33:16 item (1) 25:9	14:28;1,2,7,9,17,24; 29:2,13,15,22;30:5,7, 8,9;31:11,12;32:10, 11,15;33:17,18;34:8, 11;35:21,21;36:14 kind (1) 32:13 KISSEL (1) 5:2 knowing (1) 26:25 Kothari (1) 11:25 Kothari's (3) 12:2,11,17 KOTWICK (1) 5:7 Kruger (5) 16:5;19:11;20:10; 35:25;36:3 Kruger's (1) 10:2
H	I		J	L
half (2) 35:11,15 halfway (1) 31:23 happen (4) 24:25;30:16,22; 36:10 happens (3) 27:10,17;29:12 hard (1) 26:24 Hathaway (1) 7:11 hear (3) 27:24;30:1;31:7 heard (1) 24:5 hearing (11) 8:4,14;9:7;10:19; 11:3;13:23;15:14; 24:2,4;25:4,7 hearsay (1) 27:15 helpful (1) 32:12 helps (1) 31:11 highlighted (1)	Identify (3) 9:4;12:3;35:2 ignores (1) 22:16 immediately (1) 11:2 impermissible (1) 12:8 implicated (1) 14:19 important (1) 8:9 imposes (1) 16:18 Inc (1) 7:11 including (3) 12:23;15:19;21:18 in-court (1) 27:21 indeed (1) 10:19 independent (1) 12:5 independently (1) 12:3 indicate (2) 27:5;32:18 indicated (2)		JAMES (1) 6:19 Jeffrey (3) 9:21;10:24;14:6 JOHN (2) 4:25;19:15 joined (4) 12:1,20;13:15; 15:12 joining (1) 17:6 JONES (2) 4:10;9:7 JOSEPH (1) 6:17 JSN (2) 18:19;20:9 JSNs (7) 18:21;19:1,6,11, 19;20:3,11 JSNs' (2) 19:20;20:25 JSN's (1) 18:12 Judge (1) 16:9 judgment (1) 18:23 July (3) 10:14,24;20:13 June (1) 17:21 Junior (3) 4:2;8:17;18:17 Justice (1) 24:7	14:28;1,2,7,9,17,24; 29:2,13,15,22;30:5,7, 8,9;31:11,12;32:10, 11,15;33:17,18;34:8, 11;35:21,21;36:14 kind (1) 32:13 KISSEL (1) 5:2 knowing (1) 26:25 Kothari (1) 11:25 Kothari's (3) 12:2,11,17 KOTWICK (1) 5:7 Kruger (5) 16:5;19:11;20:10; 35:25;36:3 Kruger's (1) 10:2
			K	
			KAHAN (1) 5:16 KALISH (1) 5:20 keep (5) 26:19;29:3;31:15; 33:9;35:20 keeping (1) 31:20 KERR (30) 23:24;24:14;26:14,	lacks (1) 20:11 large (1) 34:24 last (1) 30:14 late (1) 17:9 law (2) 14:12;33:4 lawyers (2) 30:15;31:1 lead (2) 30:24;31:10 learning (1) 15:17 least (1) 13:4 legal (12) 10:1,1,4,10,18,19; 11:9,17,21;14:10; 20:7;29:25 letter (3) 19:8;20:12;26:13 lifetime (1) 19:23 light (2) 26:21,23 likely (1) 24:8 limine (20) 8:8,11,15,16,17,18, 21:9;9,20,22;10:23; 15:8;17:6;18:12; 19:21;20:14,25; 23:16,18;24:24 limited (1) 28:10

August 14, 2013

line (4) 20:22,23,23,23		method (1) 12:3		11:18;32:18
lines (1) 20:24	M	MICHAEL (1) 6:9	N	obviously (2) 29:15;35:19
Ling-Cohan (1) 24:7	M-390 (2) 16:18,23	might (1) 21:20	name (1) 9:13	o'clock (2) 32:1;35:13
Lipps (15) 9:21,24;10:3,21,24, 25;14:6,7;18:19,25; 19:3;20:3,6;21:1; 23:20	Mac (13) 5:21;6:3;8:16;12:1, 20;13:15;15:13;17:7, 13;18:7,7,9;21:18	million (1) 12:4	nature (1) 16:25	off (1) 25:8
Lipps' (2) 10:14;11:11	Mac's (4) 17:5,18;18:13; 20:13	mind (2) 14:15,19	necessarily (1) 14:19	offer (3) 35:24,24,25
list (1) 23:20	main (1) 17:18	minions (1) 33:9	necessary (1) 24:18	offered (5) 19:22;20:4;26:2; 28:22;29:20
listed (1) 23:12	Major (3) 16:3;33:22;34:5	mitigation (1) 22:5	need (6) 24:17;25:22,24,24; 32:2,8	offering (3) 18:22,24;28:4
listen (2) 25:3,5	MANGES (1) 7:2	Monarch (1) 6:13	needs (1) 35:3	offers (4) 12:12;16:16;27:14, 22
litigating (1) 20:4	March (1) 22:3	Monday (2) 25:6;33:25	negotiations (4) 15:10,16,19;16:9	officer (1) 33:24
litigation (2) 12:6;21:25	MARK (2) 5:7;35:4	monitor (4) 34:20,23,23,24	New (10) 4:4,13;5:5,12,14, 23;6:6,15;7:5;17:14	OLSON (1) 7:10
little (2) 8:12;31:13	MARY (1) 6:18	moot (1) 26:21	NewOak (2) 17:17;20:20	once (1) 27:24
live (2) 27:1,25	material (3) 13:6,8;36:2	more (5) 8:12;9:22;11:21; 24:24;33:11	next (4) 13:6;24:11;25:9; 31:2	One (22) 5:4;6:4;8:12,16,17, 22;9:9,21;17:20; 21:24;26:20;27:10; 28:2,17;29:13;30:7; 32:2;33:1,18,21; 34:2;35:22
LLP (7) 4:1,20;5:2,11;6:12; 7:2,10	materials (2) 12:24;20:16	Moreover (4) 13:4;14:8;16:24; 19:10	night (1) 35:18	one-billion-dollar (1) 22:4
loans (1) 22:21	matter (3) 16:11;20:1;24:6	morning (3) 31:23,25;36:16	Nobody (1) 34:17	only (5) 10:17;12:21;13:3; 27:24;32:12
locked (2) 35:18,20	matters (2) 10:5,12	Morrison (1) 26:15	none (1) 20:20	open (3) 22:24;26:18;33:16
logistic (1) 35:9	MAURICIO (1) 5:17	mortgage (1) 22:21	nor (1) 15:4	opening (2) 32:7,22
logistical (1) 35:22	may (12) 14:12,22;22:19; 24:17;25:8;26:21; 27:5;30:24;32:9; 33:25;34:1,18	mortgage- (1) 19:24	Noteholders (2) 4:2;8:17	openings (1) 35:6
logistics (1) 36:16	MCKOOL (4) 6:2;9:8,12;26:13	MOSS (1) 5:20	Noteholders' (1) 18:17	opens (2) 35:10,16
long (1) 23:20	mean (5) 11:11;25:14;26:4; 27:10;34:3	most (2) 14:3;30:23	number (5) 8:3,5;11:5,7;35:2	opined (1) 17:22
Look (4) 29:4;33:2,11,11	mediation (19) 15:10,14,19;16:9, 10,12,13,14,15,17,17, 20,21,24;17:1,3; 19:12,17,18	motion (34) 8:16,17;9:9,20,22; 10:9,23;11:19,25; 12:17,18,19;13:11, 13,14;14:3;15:8,9,10; 17:4,5,19;18:12,13, 16,18,21;19:20;20:9, 14,17,25;21:2;23:16	NY (8) 4:4,13;5:5,14,23; 6:6,15;7:5	opinion (12) 10:8;12:7,11,12, 24;13:11;14:7,22; 20:16;21:23;22:2,19
Los (1) 7:14	mediator (3) 16:14,19,22	motions (9) 8:8,11,15,16,21; 17:7;18:11;23:18; 24:24	object (2) 15:7;23:14	opinions (6) 10:1,10;12:2,25; 13:1;20:19
loss (2) 17:10;22:5	meet (2) 8:20,23	mountain (1) 33:2	objecting (2) 18:9;20:13	opponents (1) 34:4
losses (2) 18:4;19:24	meet-and-confer (1) 26:16	moves (1) 22:23	objection (5) 15:11;27:14;28:18; 29:25;30:3	opposition (2) 25:17;26:2
losses] (1) 17:24	Mellon (1) 5:12	much (2) 10:13;11:12	objections (5) 29:17,24,24;30:2; 34:4	oral (3) 8:11;17:2;24:4
lot (4) 30:15;31:1;33:10, 11	member (1) 17:13	MUNGER (1) 7:10	objection's (1) 29:20	order (21) 8:4,6,13;11:2,14, 22;16:10,17,18,23; 23:19;30:10,11,14; 31:6,7,9;33:6,20;
lots (1) 34:25	merits (1) 18:23	must (1) 25:12	objective (1) 18:10	
lower (1) 21:19	Messer (2) 9:15;22:24		objectivity (1) 20:11	
lunchtime (1) 35:14			objectors (2)	

August 14, 2013

34:3,5 ordering (1) 26:1 others (1) 16:20 otherwise (2) 21:20;22:12 ought (4) 28:13,14;31:1,8 out (8) 11:24;29:1;31:6,7, 10:34;3,5,25 outline (1) 18:11 outlined (1) 20:10 outstanding (2) 21:8,9 over (1) 33:20 overcome (3) 12:16;18:14;23:6 overhead (1) 34:22 overseen (1) 16:9 own (1) 31:16	12:21;15:15 party (8) 14:12;15:7;16:22; 27:6,22;28:3,19,20 party's (2) 14:15;28:19 payable (2) 22:13,13 payment (2) 12:4;15:21 payments (1) 22:9 PC (1) 6:2 Peachtree (1) 4:22 Peck (1) 16:9 pending (1) 20:17 people (1) 34:14 performed (1) 20:2 permission (1) 36:13 permit (3) 27:13;30:19,20 permitted (2) 10:3,25 person's (1) 9:13 Pfeiffer (5) 12:19,21,23;13:1, 10 Pfeiffer's (2) 12:22;13:3 Phelps (1) 12:6 picture (1) 32:15 place (1) 24:3 plan (7) 13:24;17:11,15,16; 21:20;24:23;25:3 planning (1) 32:19 Plaza (1) 5:4 pleading (1) 25:11 Please (1) 8:2 pleasure (1) 32:10 PLLC (1) 5:20 pm (2) 25:19;36:17 point (5) 13:19,22;23:10; 25:23;31:23	points (1) 29:7 portions (5) 11:1,4,6,6;19:19 possible (2) 23:13;30:15 post-settlement (1) 12:8 potential (4) 12:6;18:4;20:4; 22:12 PowerPoint (1) 35:6 precise (1) 27:24 precisely (1) 10:20 preclude (16) 9:21;10:23;11:25; 12:18,20;13:13;15:9, 13,23;17:5,8;18:7; 21:15;22:23;23:12; 32:16 precluded (7) 9:25;10:18;11:19; 18:22,24;19:7,20 preclusion (3) 10:9;14:22;18:18 prejudice (1) 23:17 pre-marked (1) 35:3 preparation (1) 33:3 prepared (2) 8:10;31:4 preparing (1) 20:16 presentation (1) 19:8 presented (1) 25:22 prevents (1) 33:23 previously (4) 10:6;20:6;25:13,14 price (1) 12:7 primary (2) 13:3;30:17 prior (3) 10:4;20:19,21 privilege (5) 13:19,21;14:14; 15:1;19:19 Procedure (5) 27:4,8,13;28:3; 29:10 proceeding (2) 17:13;23:23 proceedings (1) 36:17 process (2)	16:20,25 produce (4) 13:6,16;14:6;19:8 produced (3) 13:3,10;16:16 product (1) 12:22 proffered (1) 9:24 prohibited (1) 19:12 prohibiting (1) 16:11 prohibition (1) 16:18 projected (3) 22:9,9,20 projection (1) 22:1 promptly (1) 30:1 properly (1) 11:21 proposed (3) 10:3;15:18;33:3 protect (1) 16:8 prove (1) 14:9 provide (3) 28:15;30:12;33:7 provided (4) 10:15;16:14;20:6; 36:2 providers (1) 22:10 providing (1) 17:17 provisions (1) 22:7 public (3) 25:10;26:9,10 publicly (1) 21:24 published (1) 10:8 purposes (1) 10:18 put (7) 14:18,24;15:6; 17:23;30:14;32:8; 36:10 putting (1) 35:23	R raise (8) 24:11;26:20;28:21, 22:29;13;33:17,17; 34:13 raised (1) 26:20 raising (1) 26:13 rate (1) 12:5 rather (1) 8:7 reached (2) 8:21;9:8 reaching (1) 26:3 read (7) 28:5,15;29:8;32:4, 5,9;33:10 reading (3) 24:24;28:12;32:5 reads (1) 11:12 really (1) 29:5 reason (2) 21:21;30:14 reasonably (1) 14:9 reasons (6) 9:23;10:7,22;11:5; 18:11;20:10 REBECCA (1) 5:16 receive (3) 21:19;22:6,20 received (1) 14:23 recess (1) 31:22 record (3) 9:4;10:1;26:9 recoveries (6) 12:7;21:25;22:6, 12,17,18 recovery (1) 21:19 redacted (1) 25:18 redirect (2) 26:25;36:5 refer (1) 36:4 references (1) 26:8 referred (5) 15:24;16:1,3,6; 35:25 reflect (2) 11:23;18:3
P				
page (3) 20:22,23,23 paid (1) 22:22 papers (2) 13:3,10 paragraph (5) 11:5,7,23;16:17; 22:19 paragraphs (7) 11:16,23;15:23,25; 16:2,4;23:21 Park (2) 5:4;6:4 part (10) 9:23,23;10:24,25; 11:9;18:18,18;21:2, 2;26:9 participants (1) 16:21 particularly (1) 27:17 parties (36) 8:16;12:1,11,19; 13:5,7,15,22;14:4,8, 18,22;15:3,6,12,16, 19,22;16:7,11,12,14, 19;17:1,7;20:13; 21:19;24:5,17,18; 25:7;27:11,18;29:15; 30:21;31:6 parties' (2)				
			Q	
			quarterly (1) 22:3 quest (1) 35:9 quote (1) 13:24	

August 14, 2013

refused (1) 14:6	12:15;18:14;23:5 Residential (2) 8:3;19:24	27:4,8,13,15;29:9, 9:34:7	25:3 Services (2) 17:14,17	slightly (1) 9:22
regarding (2) 18:8,22	resolutions (1) 16:15	ruling (4) 18:12;24:4;25:11; 26:10	set (7) 10:7;20:16;29:9; 33:4,13,13;34:15	SMITH (4) 6:2;9:8,12;26:13
regulation (2) 33:22,23	resolve (2) 29:18,22	rulings (1) 8:9	setting (1) 33:12	smoking (1) 36:8
rehabilitation (6) 17:11,12,15,16; 21:20;23:23	resolved (6) 21:4,14;22:25; 23:1,2,9	run (1) 17:10	settlement (25) 10:3;11:10;12:13; 13:17;14:2,11,25; 15:6,14,20;16:7; 17:25;18:23;19:10, 13,17;21:17,21; 22:11,16;24:12; 25:16,18;26:3;34:4	smoothly (1) 30:15
Rehabilitator (2) 7:3;24:2	resolves (1) 23:18	S	settling (1) 15:3	SODERBERG (1) 4:7
reimbursement (3) 22:5,12,17	respect (21) 8:8,11,20,24;9:9, 10;10:5;12:18;18:17, 19;19:2,14,23;21:13; 23:4,11,16,20;26:10; 29:10,23	safe (1) 35:19	Seventh (1) 6:14	Sohlberg (1) 16:1
reimbursements (1) 22:20	response (1) 10:9	same (9) 17:18;19:2,4,14; 20:1,6;27:24;32:25; 35:8	several (3) 9:23;13:6,24	somebody (6) 23:22;27:13,21; 29:5;33:6;35:14
rejects (1) 20:11	responsibility (1) 30:17	save (1) 32:9	SEWARD (1) 5:2	somebody's (2) 30:17;34:14
relates (1) 22:4	restricted (1) 19:16	schedule (1) 33:12	shall (1) 16:20	Sometime (1) 17:16
relating (1) 19:9	result (2) 16:16;29:11	scheduled (1) 8:4	sheet (3) 17:11,15;19:9	sort (1) 36:13
released (1) 17:24	retain (1) 22:18	scheduling (3) 8:4;31:8;33:19	shifts (1) 18:13	sought (2) 14:10,23
relevant (1) 12:12	retained (3) 19:2,3;20:7	SCHOFIELD (1) 6:8	SHORE (1) 4:6	South (1) 7:12
reliance (4) 13:14;15:7,10,11	review (2) 13:8;25:4	score (1) 29:7	short (1) 29:25	SP (1) 11:25
relied (7) 12:10;13:10,16; 14:1,5,25;15:5	reviewing (2) 26:4,7	Scott (2) 9:10;21:13	shortly (2) 8:13;18:11	spare (2) 28:11,11
rely (1) 20:15	RICHARD (3) 4:16;7:7;24:1	screen (3) 34:24;35:1,8	side (3) 30:9,11;31:17	speak (1) 9:1
remaining (1) 26:11	right (23) 8:2;9:3,7,17,19; 11:24;13:13;15:9; 18:16;21:11,11; 22:17;23:3,11,22; 24:11,15;29:21;30:6, 6,19;31:13;33:1	seated (1) 8:2	SIDMAN (13) 4:15;8:19;9:1,3,5, 6,6,12,18;21:4,6,9; 23:9	SPEAKER (6) 22:25;23:2;32:19, 22,25;34:6
render (1) 8:10	RMBS (1) 10:12	Second (2) 14:12;19:22	significant (1) 22:20	speaking (2) 29:24;30:2
repe (1) 30:18	Ron (4) 17:5,8;19:22;21:1	section (2) 16:23;20:7	Similar (2) 15:11;16:18	specific (1) 11:15
repeat (1) 27:23	room (1) 24:22	Secured (3) 4:2;8:17;18:17	Similarly (1) 20:3	specifically (3) 8:6;15:22;17:20
repeatedly (1) 13:18	roomful (1) 25:2	securities (3) 12:8;19:25;22:21	simultaneous (2) 33:5,7	spend (1) 29:5
repetitive (1) 30:20	ROSS (1) 5:8	Securitization (1) 5:3	simultaneously (1) 14:14	spreadsheet (1) 19:9
reporter (1) 35:3	Rothschild (2) 9:14,15	seek (1) 12:20	single (1) 19:8	spring (1) 36:9
represent (1) 30:20	Rule (12) 11:10;20:17;21:14; 24:8,21;25:6;26:7; 27:5,16;28:19,21; 30:1	seeks (4) 17:7;19:3,4;21:15	sit (1) 28:12	staff (1) 20:20
representative (1) 9:13	ruled (2) 18:20;24:6	seems (2) 27:2;31:23	sitting (1) 28:16	stand (4) 26:13;29:6;34:6,23
represented (1) 10:6	Rules (7)	sent (1) 33:20	six (1) 31:16	start (2) 31:22;36:11
requested (3) 13:6;14:16;15:22		sentences (1) 11:24	SLACK (6) 7:7;23:25;24:1,1,9, 10	state (5) 14:15,19;23:23; 24:3;29:25
requests (1) 24:19		separate (2) 23:19;30:24		statement (3) 15:24;18:8;22:3
require (2) 10:11;33:3		September (2) 24:20;33:13		statements (5) 13:24;16:13,19; 32:8,22
requirements (1) 27:3		sequestration (2) 32:1,3		states (1) 22:2
ResCap (1) 17:18		serious (1)		status (1)
reserved (3)				

23:22 steering (1) 17:12 STEVEN (1) 4:17 still (9) 21:7,9;22:24; 26:18;27:20,20;29:2, 17;33:11 Stonehill (1) 6:13 stop (2) 32:1,3 Street (3) 4:12,22;5:22 strengths (1) 10:19 stress (1) 17:10 strictly (1) 16:11 stuff (1) 25:2 subject (6) 10:12,16;11:17; 20:1,6;22:10 subjects (1) 11:20 submission (1) 33:5 submitted (3) 15:3;17:14,21 substance (5) 14:20,24;15:4; 19:12,17 substantial (1) 22:12 substantive (1) 19:8 supplemental (1) 8:4 support (5) 11:9;13:24;20:17; 25:17;26:2 Sure (3) 9:6;24:22;26:18 surprise (2) 33:1;36:8 surprised (2) 34:8,10	testified (4) 20:15,18,20;27:1 testifies (1) 21:17 testify (6) 10:4,6,10,25; 26:24;34:5 testifying (1) 10:21 testimony (51) 9:21,25;10:14,15, 16,23;11:1,4,4,7,12, 25;12:17,18,20; 13:13;15:2,9,15; 16:5;17:5,8,19;18:2, 6,13,15,19,25;19:3,5, 15,20;20:3,9;21:1,1, 13,15;23:20;24:23; 25:5,23,24;27:7,21, 24;28:12;29:25; 31:24;32:5 therefore (4) 12:17;18:7;21:14; 23:16 therein (4) 15:25;16:1,3,6 third (1) 16:22 THOMAS (2) 5:8;7:16 though (1) 30:20 three (2) 31:24,25 timed (4) 27:1,9,18;31:14 tiny (1) 8:22 today (2) 26:21;29:16 told (1) 34:14 TOLLES (1) 7:10 tomorrow (4) 25:19;35:12,13,15 took (1) 24:5 track (3) 31:15,20;33:9 transactions (1) 22:11 transcript (1) 20:22 transcripts (5) 24:23;28:13,15; 29:8,10 treat (2) 11:13,14 treatment (2) 25:9;31:14 trial (18) 8:10;11:18;13:16;	15:7,12;25:10,12,21, 21;26:10;27:1,9,18; 29:4,8,16,24;31:14 trials (1) 25:11 trust (1) 19:2 Trustee (1) 5:3 trustees (10) 12:14,22;13:5,9,15, 23;14:8,16,18;17:25 trustee's (2) 14:4;33:21 trusts (7) 17:18;19:25;20:5; 21:18,22;22:8,14 try (2) 31:21;35:17 trying (2) 33:9;34:15 turn (1) 9:12 two (3) 8:16;27:10;32:2 typically (1) 31:18	34:17 usually (7) 29:11;30:1,22; 31:7,7,19,21 V vacation (1) 24:24 VANESSA (1) 4:7 various (1) 22:8 verify (2) 12:3,9 versus (1) 27:1 voluntary (1) 16:8 W waiving (1) 15:1 WALPER (1) 7:16 wants (2) 29:5;34:12 waterfall (1) 22:7 way (2) 32:8;34:7 weaknesses (1) 10:20 WEIL (2) 7:2;24:2 WEITNAUER (1) 4:25 welcome (2) 35:5,11 Wells (1) 4:21 West (1) 4:22 what's (3) 26:25;27:1;32:10 Whereupon (1) 36:17 WHITE (1) 4:1 whole (1) 24:17 who's (3) 30:23;31:10;34:17 wife (1) 24:25 willing (2) 31:5;34:2 WILLKIE (1) 6:12 wish (2) 25:11;31:17 wished (1)	24:25 wishes (1) 27:21 withdraw (1) 9:9 withheld (2) 12:22;13:18 within (1) 27:15 without (3) 15:1;23:17;26:25 witness (26) 9:25;11:1,4;15:24; 18:10,15;19:23; 20:14;23:7,12,13,15; 27:20,20;29:6,6; 30:18;31:3;33:21; 34:1,23;35:7,24;36:9, 11,13 witnesses (12) 13:20;14:4;17:21; 26:23;30:10,11;31:6, 9;33:19,21,21;34:3 Word (1) 33:8 work (7) 12:22;13:3,10; 20:19;24:16;28:25; 33:22 worked (2) 20:20,21 working (4) 26:19;29:2,3,17 works (1) 31:2 wound (1) 24:24 wrapped (1) 18:4 written (3) 11:2,22;17:2 wrongly (1) 21:24 WYNNE (1) 4:16 Y yesterday (1) 8:5 York (10) 4:4,13;5:5,12,14, 23;6:6,15;7:5;17:14 1 10 (2) 20:23;33:5 10004 (1) 5:5 10017 (1) 4:13 10019 (1)
T talk (1) 31:13 technology (2) 34:15,16 TELEPHONICALLY (1) 7:16 term (3) 17:11,15;19:9 terms (3) 22:11;28:3;33:18	testimony (51) 9:21,25;10:14,15, 16,23;11:1,4,4,7,12, 25;12:17,18,20; 13:13;15:2,9,15; 16:5;17:5,8,19;18:2, 6,13,15,19,25;19:3,5, 15,20;20:3,9;21:1,1, 13,15;23:20;24:23; 25:5,23,24;27:7,21, 24;28:12;29:25; 31:24;32:5 therefore (4) 12:17;18:7;21:14; 23:16 therein (4) 15:25;16:1,3,6 third (1) 16:22 THOMAS (2) 5:8;7:16 though (1) 30:20 three (2) 31:24,25 timed (4) 27:1,9,18;31:14 tiny (1) 8:22 today (2) 26:21;29:16 told (1) 34:14 TOLLES (1) 7:10 tomorrow (4) 25:19;35:12,13,15 took (1) 24:5 track (3) 31:15,20;33:9 transactions (1) 22:11 transcript (1) 20:22 transcripts (5) 24:23;28:13,15; 29:8,10 treat (2) 11:13,14 treatment (2) 25:9;31:14 trial (18) 8:10;11:18;13:16;	ultimate (1) 10:18 under (7) 17:25;21:20;22:7, 11;24:6;28:18,20 underlying (2) 12:10;22:21 UNIDENTIFIED (6) 22:25;23:2;32:19, 22,25;34:6 unless (3) 29:11;30:13;36:8 unrealistic (1) 25:5 unredacted (7) 25:19,22,25;26:4,6, 7,8 unreliable (1) 12:2 unsealed (2) 25:12,16 unsealing (1) 26:1 up (5) 24:18,24;26:16; 31:3;34:15 use (7) 20:15,18;27:12; 31:17;34:18;35:5,6 used (5) 12:3,5;27:5,19; 31:19 using (1)	usually (7) 29:11;30:1,22; 31:7,7,19,21 V vacation (1) 24:24 VANESSA (1) 4:7 various (1) 22:8 verify (2) 12:3,9 versus (1) 27:1 voluntary (1) 16:8 W waiving (1) 15:1 WALPER (1) 7:16 wants (2) 29:5;34:12 waterfall (1) 22:7 way (2) 32:8;34:7 weaknesses (1) 10:20 WEIL (2) 7:2;24:2 WEITNAUER (1) 4:25 welcome (2) 35:5,11 Wells (1) 4:21 West (1) 4:22 what's (3) 26:25;27:1;32:10 Whereupon (1) 36:17 WHITE (1) 4:1 whole (1) 24:17 who's (3) 30:23;31:10;34:17 wife (1) 24:25 willing (2) 31:5;34:2 WILLKIE (1) 6:12 wish (2) 25:11;31:17 wished (1)	24:25 wishes (1) 27:21 withdraw (1) 9:9 withheld (2) 12:22;13:18 within (1) 27:15 without (3) 15:1;23:17;26:25 witness (26) 9:25;11:1,4;15:24; 18:10,15;19:23; 20:14;23:7,12,13,15; 27:20,20;29:6,6; 30:18;31:3;33:21; 34:1,23;35:7,24;36:9, 11,13 witnesses (12) 13:20;14:4;17:21; 26:23;30:10,11;31:6, 9;33:19,21,21;34:3 Word (1) 33:8 work (7) 12:22;13:3,10; 20:19;24:16;28:25; 33:22 worked (2) 20:20,21 working (4) 26:19;29:2,3,17 works (1) 31:2 wound (1) 24:24 wrapped (1) 18:4 written (3) 11:2,22;17:2 wrongly (1) 21:24 WYNNE (1) 4:16 Y yesterday (1) 8:5 York (10) 4:4,13;5:5,12,14, 23;6:6,15;7:5;17:14 1 10 (2) 20:23;33:5 10004 (1) 5:5 10017 (1) 4:13 10019 (1)

6:15	16:2			
10036 (3)	22 (2)	5		
4:4;5:14;6:6	20:23,24			
10153 (1)	222 (1)	5 (4)		
7:5	4:12	16:4;20:23;32:1,3		
10168 (1)	23 (1)	5,001,609,304 (1)		
5:23	16:2	18:1		
1095 (1)	24 (2)	5.1 (1)		
5:13	16:2;20:22	16:23		
1155 (1)	25 (1)	57 (1)		
4:3	16:4	16:5		
11th (1)	2519 (1)	59 (1)		
17:22	16:10	16:5		
12 (1)	253.3 (1)			
16:2	12:4	6		
1201 (1)	26 (1)			
4:22	16:4	6 (3)		
12-12020 (1)	26th (2)	15:23,25;20:24		
8:3	33:6,13	6th (2)		
125 (1)	27 (1)	13:4;24:3		
5:22	22:19			
129 (1)	28 (1)	7		
20:24	16:4			
12th (1)	29 (1)	7 (1)		
10:8	20:13	16:2		
132 (1)		767 (1)		
20:22	3	7:4		
133 (1)		787 (1)		
20:23	3 (1)	6:14		
136 (1)	35:13			
20:23	30309 (1)	8		
138 (1)	4:23			
20:23	31 (3)	8:30 (1)		
14 (2)	10:14,24;22:3	35:10		
15:25;16:4	327e (1)			
15 (1)	20:7	9		
16:4	32a (1)			
16 (1)	28:19	9 (4)		
15:23	35 (1)	15:23,25;16:2;		
16th (2)	16:4	31:22		
24:20;33:13	355 (1)	90071 (1)		
17 (1)	7:12	7:14		
16:2	35th (1)	9019 (3)		
18 (1)	7:13	10:19;11:10;26:3		
15:24	39 (1)	9109 (1)		
19 (1)	16:4	20:17		
24:13				
19th (1)	4			
25:6				
2	4 (3)			
	15:23;16:17;25:19			
2 (1)	4:47 (1)			
8:5	36:17			
20 (1)	41 (1)			
15:25	16:4			
2011 (2)	41st (1)			
17:10;20:2	4:12			
2013 (8)	42 (1)			
10:8,15,24;17:22;	16:4			
20:13;22:3;24:20;	42nd (1)			
33:6	5:22			
21 (1)	47th (1)			
	6:5			